90-1171

Supreme Court, U.S.
FILED
DEC 26 1990
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

COMMUNITY NATIONAL BANK, PETITIONER

v.

RICHARD W. SHERK, JR.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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December, 1990

QUESTION PRESENTED

A debtor's homestead was sold at a non-judicial foreclosure and purchased at the sale by the mortgagee. Pursuant to an agreement between the debtor and the mortgagee, the price paid at the foreclosure sale was approximately the amount of the mortgagee's lien, but considerably less than the appraised value of the property. Also pursuant to the agreement with the debtor, the mortgagee sold the property to a third-party lender for the same price as the mortgagee had purchased the property, plus accrued interest. The debtor and the third-party lender had entered into an agreement whereby the debtor had a purchase option to re-purchase the property from the third-party lender for approximately the

price paid by the third-party lender, thus allowing the debtor the option of recovering all of his equity in the property.

1. Whether it is appropriate under Section 548(a)(2)(A) for the bankruptcy court to consider unique factors surrounding a foreclosure sale in addition to the sales price when determining whether a "reasonably equivalent value" was received by a debtor for the transfer of property sold at a non-judicial foreclosure sale.

List of All Parties:

Community National Bank is now owned by First State Bank. Richard W. Sherk, Jr. is the only other party.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

No.

COMMUNITY NATIONAL BANK, PETITIONER

v.

RICHARD W. SHERK, JR.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Kenneth A. Richey, on behalf of Community National Bank, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, infra, 1a) affirming the opinion of the district court is not reported. The opinion of the district court (App. B,

infra, 2a-4a) affirming the opinion of the bankruptcy court is not reported. The opinion of the bankruptcy court [App. C, infra, 5a-7a) is not reported.

JURISDICTION

The judgment of the court of appeals (App. A, infra, 1a) was entered on September 24, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

STATUTORY PROVISIONS INVOLVED

1. Section 548 of the U.S. Bankruptcy Code (11 U.S.C. Sec. 548) provides in relevant part:

> (a) The trustee may avoid any transfer of an interest of the debtor in property . . . that was made or incurred on or within one year before the date of the filing of the petition, if the debtor --
>
> . . .
>
> (2)(A) received less than a reasonably equivalent value

in exchange for such transfer

. . . .

STATEMENT

This case concerns judicial interpretation of the statutory term "reasonably equivalent value" as found in Sec. 548 of the United States Bankruptcy Code. 11 U.S.C. Sec. 548(a)(2) (1978). The judicial interpretation of this term, as adopted by the Fifth Circuit Court of Appeals in Durrett v. Washington National Insurance Co., 621 F.2d 201 (5th Cir. 1980), and its progeny, conflicts with the interpretations of this term given by other circuits, thus resulting in inconsistent application of federal bankruptcy law.

The facts of this case, as found by Judge Larry E. Kelly, Chief U.S. Bankruptcy Judge of the United States

Bankruptcy Court for the Western District of Texas - Austin Division (App. D, infra, 8a-24a), can be briefly summarized as follows. The underlying note obligation, which was owed by Richard W. Sherk, Jr. ("Sherk") to Community National Bank ("CNB") went into default. On several occasions, the collateral securing the obligation, Sherk's homestead, was posted for foreclosure, but the sales were passed as CNB worked with Sherk to resolve the matter either by curing the defaults or by finding a third-party purchaser.

On March 3, 1987, CNB foreclosed upon the homestead and purchased the homestead at the sale for the entire amount of principal, interest and legal fees due and owing under the note as of the date of the sale ($123,177.96). CNB purchased the homestead at this price pursuant to an

agreement with Sherk that CNB would convey the homestead to Sherk or his nominee for payment in cash of the bank's cost in the property. Approximately one month later, Sherk entered into an agreement with Texas Bankers Life and Loan Insurance Company ("Texas Bankers") wherein Texas Bankers would acquire the homestead property from CNB and Sherk would be allowed to reacquire the property from Texas Bankers under a lease-purchase agreement.

On or about April 7, 1987, CNB conveyed the homestead property to Texas Bankers, as agreed, for $123,177.96 plus interest that had accrued from and after March 3, 1987. At the time of the conveyance of the homestead property to Texas Bankers, Sherk executed a release expressly approving the re-sale of the property to Texas Bankers and releasing

CNB from any claims arising out of the foreclosure of the homestead property. Sherk subsequently defaulted on his agreement with Texas Bankers and Texas Bankers terminated the agreement.

The bankruptcy court found that the homestead property had a value at the time of foreclosure of not less than $250,000.00 and ruled that as a matter of law the $123,177.96 was not a reasonably equivalent value for the property, citing Durrett, id. The bankruptcy court then entered a judgment against CNB for the net amount of $126,822.04 ($250,000.00 - $123,177.96). The judgment is located at Appendix C.

The bankruptcy court ruling was affirmed without comment or opinion by the District Court for the Western District

of Texas -Austin Division and by the Court of Appeals for the Fifth Circuit.

REASONS FOR GRANTING THE PETITION

This case presents an important question regarding how the statutory language of "reasonably equivalent value" in 11 U.S.C. Sec. 548(a)(2)(A) should be judicially interpreted. The various courts of appeals are inconsistent and conflict on this issue. It is important that the federal bankruptcy laws be uniformly applied in all states to preserve the appearance of fairness and to prevent forum shopping. Whether a non-judicial foreclosure sale is set aside by a bankruptcy court as a fraudulent conveyance should not depend upon the circuit in which a person lives.

The Court of Appeals for the Fifth Circuit affirmed, in this case, a strict

reading of Durrett in which any non-judicial foreclosure sale that results in a sales price of less than 70% of the fair market value of the property is, "as a matter of law," not a "reasonably equivalent value," thus resulting in a fraudulent conveyance.

At the other end of the spectrum, the Sixth and Ninth Circuits would have ruled that the sales price is irrelevant because of an irrebuttable presumption that "reasonably equivalent value" has been paid if the sale was a regularly conducted, non-collusive foreclosure sale. Madrid v. Lawyers Title Insurance Corp., 21 B.R. 424 (9th Cir. BAP 1982), aff'd on other grounds, 725 F.2d 1197 (9th Cir. 1984), cert. denied, 469 U.S. 833 (1984); Winshall Settlor's Trust, 758 F.2d 1136 (6th Cir. 1985).

In the middle of the spectrum, the Seventh and Eighth Circuits would have required the bankruptcy court to examine the entire transaction to determine whether the transfer was calculated to return to the debtor-mortgagor his equity in the property. Bundles v. Baker (In re Bundles), 856 F.2d 815 (7th Cir. 1988); Hulm v. First Federal Savings and Loan Association, 738 F.2d 323 (8th Cir. 1984), cert. denied, 469 U.S. 990, (1984). The bankruptcy court would have been required to focus on what the debtor received in return for what he surrendered (Bundles, 856 F.2d at 821), in which case the Court could have ruled that the debtor had received "reasonably equivalent value" for the property because he had retained the right to recover all of his equity in the

property through the lease-purchase agreement with Texas Bankers.

The issue arises because the Bankruptcy Code does not define what is meant by the term "reasonably equivalent value." Ruebeck v. Attleboro Savings Bank (In re Ruebeck), 55 B.R. 163 (Bankr. Mass. 1985). "If anything is clear from the various uses of the word 'value' in the Code, it is that Congress did not mean fair market value when it used the term reasonably equivalent value." Bundles, 856 F.2d at 824.

Courts in the Fifth Circuit are bound to apply the strict 70% Durrett rule even when they believe they should not. In Coleman v. Home Savings Association, 21 B.R. 832 (Bankr. S.D. Texas - Houston 1982), after determining that the lender purchased the debtors' equity for

approximately 28% of the market value of the equity and noting that this amount was considerably below the 70% benchmark set by Durrett, the court stated that it "has no alternative" but to find that the amount paid was less than reasonably equivalent value. The court went on to state that "(i)f this court were free to do so, it would follow Judge Clark's dissent [in Abramson v. Lakewood Bank and Trust Co., 647 F.2d 547 (5th Cir. 1981)]." Coleman, 21 B.R. at 834. The point to which the court was referencing in Clark's dissent in Abramson was that generally foreclosure sales "do not bring the best price, but most states, including Texas, mandate public sales when foreclosure is the creditor's remedy." Abramson, 647 F.2d at 550.

To be forced to apply a strict 70% Durrett rule to find a lack of reasonably equivalent value, even in cases in which the court believes reasonably equivalent value was paid, directly contradicts the interpretations of "reasonably equivalent value" as defined in other circuits. In Madrid, supra, the court specifically declined to follow Durrett's 70% rule. The court stated that the law of foreclosures should be harmonized with the law of fraudulent conveyances. Compatible results, according to the court, can be obtained by construing the reasonably equivalent value requirement of 11 U.S.C. Sec. 548(a)(2) to mean the same as the consideration received at a non-collusive and regularly conducted foreclosure sale. Thus, in the absence of defects, such foreclosure withstands avoidance as a

fraudulent conveyance. Madrid, 21 B.R. at 427.

While Durrett and Madrid (and the progeny of each) are at polar opposites regarding how cases are treated to determine whether reasonably equivalent value was paid at a foreclosure sale, neither line of cases allows the court flexibility in analyzing the underlying circumstances surrounding the foreclosure sale to determine whether a reasonably equivalent value was truly paid at the foreclosure sale. The Seventh Circuit has adopted a more "middle ground" approach to defining reasonably equivalent value. According to the Seventh Circuit, in defining reasonably equivalent value, "the court should neither grant a conclusive presumption in favor of a purchaser at a regularly conducted, non-collusive

foreclosure sale, nor limit its inquiry to a simple comparison of the sale price to the fair market value." Bundles, 856 F.2d at 824.

The implementation of the Bundles approach requires a case-by-case adjudication in which "the bankruptcy court must be mindful constantly of the purpose of section 548's avoiding powers - to preserve the assets of the estate." Bundles, 856 F.2d at 824. This consideration requires that in determining reasonably equivalent value, the court must focus on what the debtor received in return for what he surrendered. Bundles, 856 F.2d at 824, citing Martin v. Phillips (In re Butcher), 58 B.R. 128, 130 (Bankr. E.D. Tenn. 1986); and Meister v. Jamison (In re Jamison), 21 B.R. 380, 382 (Bankr. D. Conn. 1982). The Seventh's Circuit

approach has been followed by the Eighth Circuit. See Hulm, supra.

In the present case, if the bankruptcy court had followed Bundles, instead of Durrett, the court would have been able to consider whether the agreement between Sherk and CNB, when combined with the bid price at the foreclosure sale, was reasonably equivalent value. The fact that the property was transferred to a third party does not detract from this argument since the third party was Sherk's designee with whom Sherk had an agreement that allowed him to keep his equity intact.

The cases recognize that a debtor may sometimes receive "fair" consideration (now reasonably equivalent value) even though the consideration given for the property goes initially to a third party.

Rubin v. Manufacturers Hanover Trust Co., 661 F.2d 979 (2d Cir. 1981). If the consideration given to the third person has ultimately landed in the debtor's hands, or if the giving of the consideration to the third person otherwise confers an economic benefit upon the debtor, then the debtor's net worth has been preserved, provided that the value conferred upon the debtor approximates the value of the property he has given up. Rubin, 661 F.2d at 991. In the present case, the debtor's equity was protected by agreement with CNB which allowed the property to be transferred to a third party, Texas Bankers, with whom the debtor had an agreement which would allow the debtor to recover all of his equity in the homestead property.

The Fifth Circuit's application of Durrett's 70% rule for defining "reasonably equivalent value" prohibits the court from considering factors that, under other circuits' definitions of the term, would have allowed the court to find that reasonably equivalent value was given to the debtor.

CONCLUSION

For the reasons set forth above, Petitioner respectfully prays that a writ of certiorari should issue to review the Judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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ATTORNEY FOR PETITIONER

December, 1990

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-8262

Summary Calendar

IN THE MATTER OF: RICHARD W. SHERK, JR.
Debtor.
COMMUNITY NATIONAL BANK,
Appellant,
versus
RICHARD W. SHERK, JR.,
Appellee.

Appeal from the United States District Court
for the Western District of Texas
(A 90 CA 103)
(September 24 , 1990)

Before KING, JOHNSON, and GARWOOD,

Circuit Judges.

PER CURIAM:-

Affirmed. See Local Rule 47.6.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

IN RE:	)(	
	)(	
RICHARD W. SHERK, JR.	)(	
Debtor	)(	
	)(	
COMMUNITY NATIONAL BANK	)(	CIVIL NO. A-90-
	)(	CA-103
Appellant	)(	
	)(	
VS .	)(	
	)(	
RICHARD W. SHERK, JR	)(	
Appellee	)(	

ORDER

Before the Court is an appeal from an Order of the Bankruptcy Court brought pursuant to 28 U.S.C. _158(a). The Appellant claims that the Bankruptcy Judge erred in finding a transfer effectuated by a foreclosure was a

fraudulent transfer within the meaning of 11 U.S.C. __548(a)(1); (2)(A) and (b)(i). Having considered the briefs of the parties, the order appealed from, and the entire record on appeal, the Court is of the view that the Bankruptcy Court's decision was correct and should be AFFIRMED.

Appellant basically argues that the foreclosure at issue did not amount to a fraudulent transfer because it was beneficial to the debtor and not Community National Bank, and that said transfer constituted full payment to the debtor. The Court finds that the Bankruptcy Court's decision on this issue was correct, and the fact findings supporting that decision were not clearly erroneous. The Court therefore finds that the Bankruptcy Court did not err in

finding the conveyance at issue to constitute a fraudulent transfer prohibited by 11 U.S.C. _548.

ACCORDINGLY, the Court hereby adopts the opinion of the Bankruptcy Court and Affirms the decision of the Bankruptcy Court in all respects.

SIGNED AND ENTERED this 27th day of March, 1990.

JAMES R. NOWLIN

APPENDIX C

UNITED STATES DISTRICT JUDGE
UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

IN RE	)	
	)	
RICHARD W. SHERK, JR., DEBTOR(S)	)	CASE NO. 87-11943
	)	
	)	
RICHARD W. SHERK, JR., Plaintiff,	)	Adversary No. 87-1288
	)	
vs.	)	
	)	
TEXAS BANKERS LIFE AND LOAN INSURANCE COMPANY, AUSTIN AND COMMUNITY NATIONAL BANK, Defendants.	)	
	)	

Came on before the Court to be considered the above Adversary Proceeding on October 27, 1989. Of even date herewith this Court has entered its Findings of Fact and Conclusions of Law which are incorporated herein for all

purposes. Based upon such Findings of Fact and Conclusions of Law, this Court has determined that a fraudulent transfer within the meaning of 11 U.S.C. _548 was effectuated by a non-judicial foreclosure of the Debtor's homestead on March 3, 1987 by Defendant Community National Bank. This Court has further determined, pursuant to 11 US.C. _550 that the Debtor has suffered damages in the net amount of $126,822.04, for which judgment should be entered in favor of the Debtor against the Defendant Community National Bank; and

IT IS THEREFORE ORDERED that the Debtor recover judgment against Community National Bank for the amount of $126,822.04 with interest as allowed by law after entry of this judgment. Any other relief not specifically granted by

this judgment is DENIED. This judgment is entered for which let execution issue.

SIGNED this 27th day of January, 1990.

LARRY E. KELLY
Chief U. S. Bankruptcy Judge

Copy to:

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Austin, Texas 78731

Mr. Ted Cackowsky
708 Rio Grande
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Austin, Texas 78768-2006

APPENDIX D

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

IN RE	)	
	)	
RICHARD W. SHERK, JR.,	)	CASE NO.
DEBTOR(S)	)	87-11943
	)	
RICHARD W. SHERK, JR.,	)	
Plaintiff,	)	Adversary No.
	)	87-1288
vs.	)	
	)	
TEXAS BANKERS LIFE AND LOAN INSURANCE COMPANY, AUSTIN AND COMMUNITY NATIONAL BANK,	)	
Defendants.	)	
	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On the 27th day of October, 1989, came on to be heard the above adversary proceeding wherein the Debtor-Plaintiff, Richard W. Sherk, Jr. ("Sherk") seeks to avoid a pre-petition foreclosure of his homestead under 11 U.S.C. _548 and

to recover the value of same pursuant to 11 U.S.C. _550. This Court has earlier entered Findings which have dismissed the allegations against Texas Bankers Life and Loan Insurance Company. This matter proceeded to trial on the merits solely against the Defendant Community National Bank ("CNB"). Pursuant to Bankruptcy Rule 7052 and Fed. R. Civ. Pro. 52 the Court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Prior to filing of this bankruptcy case the Debtor owned a home located at 5311 Musket Ridge, Austin, Texas more fully described as Lot 17, Block D, Great Hills VIII-A, an Addition in the City of Austin, Travis County, Texas, according to the map or plat of record in Book, 77, Pages 369 - 371, of the Plat Records

of Travis County, Texas. At all times pertinent to this proceeding the Debtor and his wife have claimed this property as their homestead.

2. The evidence indicated that the Debtor was a builder and had in fact built the home in question. The underlying note obligation, which was owed to Community National Bank had become in default. On more than one occasion pre-bankruptcy, the Debtor's note was accelerated, and the property was posted for non-judicial foreclosure. On more than one occasion pre-bankruptcy, the Debtor entered into an oral agreement with the bank, by and through Mr. Morgan Pearce to pay certain sums of money to have the foreclosure passed. An example of the acknowledgement of such an agreement is found in Defendant's Exhibit

17, dated November 3, 1986, at which time Morgan S. Pearce and Richard W. Sherk, Jr. each signed an acknowledgement that $5,000.00 has been paid to be applied to legal fees of the bank and on the Debtor's loan at the bank. Said Exhibit goes on to state that the note is still in a delinquent status, is not reinstated but the foreclosure sale would in fact be passed.

3. Testimony of Richard Sherk indicated that he had begun his banking relationship with CNB in or about 1979 and had been involved in a series of loans there. He did not always pay those loans on time. At least on one prior note which was in default he negotiated with CNB to find another buyer for property which secured that loan. CNB cooperated with him in locating another

buyer who took over the defaulted loan at that time.

4. The evidence indicated that there were several defaults on the homestead loan issue and there were continuing negotiations to pass the foreclosure sales and to bring the note current or to find a third party buyer to take over the loan or otherwise acquire the house from Sherk. In or about January 26, 1987, Sherk received another demand letter indicating that the underlying note obligation on the homestead had been accelerated and advising him that the property would again be posted for foreclosure. (Defendant's Exhibit 18)

5. After this demand letter (Defendant's Exhibit 18) was received, additional discussions were had between

Sherk and Morgan Pearce to determine how the default might be cured. The evidence indicates that there were some discussions wherein Sherk requested that CNB allow Sherk to find a buyer for the home.

6. The property$was ultimately posted for non-judicial foreclosure and on March 3, 1987, CNB foreclosed upon the homestead property. At the foreclosure sale CNB was the high bidder, bidding in the sum of $123,177.96. This sum represented the entire indebtedness of principal and interest and legal fees due and owing to CNB that date.

7. Defendant's Exhibit 24 is a letter dated March 20, 1987, which was executed by Morgan Pearce, apparently acting as counsel for CNB, indicating that he had advised Sherk and his

apparent attorney, Mr. Forest Troutman, that the bank would convey the property (homestead) to Mr. or Mrs. Sherk or their nominee "upon the payment to the bank, in cash, of the bank's cost in the property, including attorney's fees." There was no agreement that prevented CNB from disposing of the property to its own choice of buyers however, should one be located.

8. In or about April 7, 1987, Richard Sherk entered into some agreement with Texas Bankers Life and Loan Insurance Company ("Texas Bankers") wherein Texas Bankers would acquire the homestead property from CNB.

9. Texas Bankers did in fact pay CNB approximately $123,177.96 plus interest which accrued from and after March 3, 1987, to acquire the homestead

property.

10. Sherk entered into a general release agreement with CNB, dated April 7, 1987. The release agreement purported to release CNB from any claims arising out of the foreclosure of the homestead and expressly approved the resale of the property to Texas Bankers. (See Defendant's Exhibit 26)

11. The evidence indicates that Sherk had entered into some agreement with Texas Bankers that if it acquired the homestead property, he would enter into some form of lease purchase agreement in order to reacquire it. Notwithstanding the terms of that agreement or the lease purchase agreement, Sherk again defaulted and Texas Bankers terminated the agreement. (See generally, Defendant's Exhibits 30

and 31.) Credible appraisal testimony given in this case by Steven Adams indicates that the market value of the property at 5311 Musket Ridge on or about March 3, 1987 was $250,000.00 (See Defendant's Exhibit 44). Notwithstanding the Debtor's testimony that the property was worth approximately $324,000.00, the Court finds Mr. Adams testimony to be the most credible testimony in the record and therefore finds the value of the property to be $250,000.00 on. March 3, 1987.

12. Defendant CNB asserts that it had reached "an agreement" with Sherk to "hold" the homestead property until such time as Sherk found a nominee. The Defendant therefore asserts that it paid $123,177.96 plus a value which should be credited for "holding" the title to the

property until Sherk found a subsequent buyer. Therefore the CNB represents that it in effect retained ownership of the property in question for Sherk and that the only real transfer took place when Texas Bankers acquired the property after reaching some subsequent understanding with Sherk. However, no evidence was introduced by CNB of any specific or enforceable agreement relating to such an understanding. Morgan Pearce did not testify although the evidence indicated that any such agreement would have been made through him. CNB's demand letter (Defendant 15, 16, 17, 18, and 19) as well as the Trustee's Deed (Defendant 23) and post-foreclosure letters (D-24 and D-25) do not indicate any special agreement which could in any way be determined as binding or enforceable or

even completely indicating that there was some agreement by which CNB would "hold'' the title for Sherk. In fact, the foreclosure appears to have been a binding and final foreclosure and CNB's offer to transfer upon receiving a take out of the amount due and owing to it appears to be nothing more than what most lenders would do with "other real estate owned" on their books.

13. The Court concludes that the foreclosure on March 3, 1987 was a transfer of the Debtor's property within the meaning or 11 U.S.C. _548.

14. The Court finds from the Debtor's sworn schedules of which it has taken judicial notice and the testimony of the Debtor which is not disputed by any other credible evidence, that the Debtor was insolvent at the time of the

transfer or become insolvent as the result of the transfer on March 3, 1987.

CONCLUSIONS OF LAW

1. In pertinent part 11 U.S.C. _548 provides:

> The trustee may void any transfer of an interest of a debtor in property...that was made or incurred on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily --
> (2) (A) receive less that a reasonably equivalent value in exchange for such transfer or obligation; and
>
> (B) (i) was insolvent on the date that such transfer was made or...became insolvent as result or such transfer... '.

2. In pertinent part 11 U.S.C. _550 provides:

> Except as otherwise provided in this section, to the extent that a transfer is avoided under..._548...of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders the value of such property, from
>
> 1. the initial transferee of such transfer or the entity for whose benefit such transfer was made...".

3. This Court concludes as a matter of law that $123,177.96 is not a reasonable equivalent value for the homestead, which had a value at the time of foreclosure of not less than $250,000.00. See Durette v. Washington National Insurance co., 621 Fed.2d 201 (5th Cir. 1980).

4. This Court finds no evidence which supports a binding agreement to show that the foreclosure was not intended as a transfer or was merely intended as an additional security device by which CNB would hold the property for assignment to a nominee or assignee of the Debtor. The evidence does show that the bank did sell the property to Texas Bankers, that such transfer was made at the request and with the approval of Sherk, and that the bank did not charge

much more than the payoff on its loan plus intervening accrued interest. However, there is no evidence to support the assertions by Community National Bank, that it did so solely because of a pre-existing agreement with Sherk. Community National Bank benefitted from the subsequent sale to Texas Bankers because it took property out of its "other real estate owned" category for cash. There is no credible evidence to indicate that the subsequent sale to Texas Bankers was made solely because of any agreement with Sherk or that CNB was in anyway impaired because of some agreement with Sherk, in how it would dispose of the homestead property. The transfer to Texas Bankers was just as beneficial to Community National Bank as it potentially was to Sherk.

5. This Court concludes that the involuntary transfer effectuated by the foreclosure on March 3, 1987 was a fraudulent transfer within the meaning of 11 U.S.C. _548(a) (1) and (2)(A) and (b)(i) and that the liability of CNB under 11 U.S.C. _550 is a judgment in favor of the Debtor for the value of the property. This Court finds that since the property has subsequently been conveyed by CNB to what this Court has previously found to be a good faith transferee, Texas Bankers, that CNB is entitled to offset against the value the amounts which were due and owing to it on March 3, 1987. Therefore the net judgment in favor of the Debtor Richard W. Sherk, Jr. is $250,000.00 less $123,177.96 for an aggregate judgment of $126,822.04.

6. Any other relief not specifically found herein should be denied.

A separate judgment of even date herewith will be entered incorporating the above Findings of Fact and Conclusions of Law in granting judgment in favor of the Debtor Richard W. Sherk against Community National Bank for $126,822.04.

SIGNED this 4th day of January, 1990.

LARRY E. KELLY
Chief U. S. Bankruptcy Judge

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APPENDIX E

SECTION 548 (11 U SC _ 548)

_ 548. Fraudulent transfers and obligations.

(a) The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that one year before the date of was made or incurred on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily--.

(1) made such transfer or incurred such obligation with actual intent to hinder., delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted; or

(2) (A) received less than a reasonably equivalent value# in exchange for such transfer or obligation; and

(B)(i) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;

(ii) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was any reasonably small capital or

(iii) intended to incur, or believed that the debtor would incur, debts that

would be beyond the debtor's ability to pay as such debts matured.

(b) The trustee of a partnership debtor may avoid any transfer of an interest of this debtor in property or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, to a general partner in the debtor, if the debtor was insolvent on the date such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation.

(e) except to the extent that a transfer or obligation voidable under this section is voidable under section 544, 646, or 547 of this title, a transferee or obligee of such a transfer or obligation that takes for value and in good faith has a lien on or may retain any interest transferred or may enforce any obligation incurred, as the ease may be, to the extent that such transferee or obligee gave value to the debtor in exchange for such transfer or obligation.

(d)(1) Fort,the purposes of this section, a transfer is made then such transfer is so perfected that a. bona fide purchaser from the debtor against whom applicable law permits such transfer to be perfected cannot acquire an interest in the property transferred that is superior to the interest in such, property of the transferee, but if such transfer is not so perfected before the commencement

of the case, such transfer is made immediately before the date of the

filing of the petition

(2) In this section----

(A) "value" means property, or satisfaction or security of a present of antecedent debt of the debtor, but does not include an unperformed promise to furnish support to the debtor or to a relative of the debtor;

(B) a commodity broker, forward contract merchant, stockbroker, financial institution, or securities clearing agency, that receives a margin payment, as deemed in section 101(34), 741(5) or 761(15) of this title, or settlement agreement, as defined in section 101(35) or 741.(8) of this title, takes for value to the extent of such payment;

(C) a repo participant that receives a margin payment, as defined in section 741(5) or 761(15) of this title, or settlement payment, as defined in section 741(8) of this title, in connection with a repurchase agreement, takes for value to the extent of such payment; and

(D) a swap participant that receives a transfer in connection with a swap agreement takes for value to the extent of such transfer.

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(2)

No. 90-1171

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

COMMUNITY NATIONAL BANK,

Petitioner,

vs.

RICHARD W. SHERK, JR.,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI

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January, 1991

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RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI

The Respondent, Richard W. Sherk, respectully requests this Court deny the Petition for Writ of Certiorari, seeking review of the Fifth Circuit's opinion.

COUNTERSTATEMENT OF THE CASE

The facts of this case were found by Judge Larry E. Kelly, Chief U.S. Bankruptcy Judge of the United States Bankruptcy Court for the Western District of Texas-Austin Division (Appendix 8a-24a), to be substantially as set forth in the Petition, with the following modification:

Petitioner claims that it purchased the property in question "pursuant to an agreement with [Respondent] Sherk that [Petitioner] CNB would convey the homestead to Sherk or his nominee for payment in cash of the bank's cost in the property." Petition for Writ of Certiorari, Pages 4-5. That is incorrect. There were no agreements between Petitioner and Respondent at the time of the foreclosure sale. Judge Kelly found that although "the evidence indicates that there were

some discussions wherein Sherk requested that CNB allow Sherk to find a buyer for the home," (Finding of Fact 5, Appendix 13a), "there was no agreement that prevented CNB from disposing of the property to its own choice of buyers, however, should one be located" (Finding of Fact 7, Appendix 14a). Judge Kelly further found no evidence "of any specific or enforceable agreement" by which CNB would "hold" the title for Sherk or Sherk's nominee. (Finding of Fact 12, Appendix 16a-17a). The only evidence of any sort of agreements concerned acts occurring weeks after the March 3, 1987, foreclosure sale. (Findings of Fact 6-8, 10, Appendix 13a-15a).

REASONS FOR DENYING THE WRIT

This case concerns how courts should interpret the term "reasonably equivalent value" as used in Section 548 of the U.S. Bankruptcy Code, 11 U.S.C. §548(a)(2)(1978). Petitioner claims that the holding of the Fifth Circuit Court of Appeals in Durrett v. Washington Nat. Ins. Co., 621 F.2d 201 (1980), conflicts with that of other circuit courts, thereby producing an inconsistent application of federal bankruptcy law. The issue arises because Congress has not defined "reasonably equivalent value".

In Durrett, the Fifth Circuit Court of Appeals held that 57.7% of the fair market value of the property sold at the foreclosure sale was not a "fair equivalent" of the property because the bankruptcy estate was thereby deprived of an equity in the property of $84,600.00. 621

F.2d at 203. (Durrett was decided under the Bankruptcy Act, and the Act's corresponding statute, 11 U.S.C. §107(d)(1), (e)(1), used the term "fair equivalent" rather than the current statute's "reasonably equivalent value.") The court pronounced this "in light of the record made in the district court and the applicable case law". Ibid. In dictum, the court simply notes that it was unable to find a district or appellate court decision approving of a similar transfer for less than 70% of the property's fair market value.

While some courts have subsequently interpreted that case as delineating a 70% benchmark, the Fifth Circuit Court of Appeals has never adopted a 70% bright-line test by holding that such a ratio between purchase price and fair market value is the only factor to be considered.

In the present case, the Bankruptcy Court was presented with a situation more egregious than that in Durrett, as only 49% of the fair market value was paid at the foreclosure, compared to the 57.7% in Durrett. (Findings of Fact 6 and 11, Appendix 13a and 16a). When the Bankruptcy Court states that "as a matter of law" the sale price was not a reasonable equivalent value, and cites Durrett, that is all to which the Court is referring. Conclusion of Law 3, Appendix 20a.

In Bundles v. Baker (In re Bundles), 856 F.2d 815 (1988), the Seventh Circuit Court of Appeals said that "the court should neither grant a conclusive presumption in favor of a purchaser at a regularly conducted, non-collusive foreclosure sale, nor limit its inquiry to a simple comparison of the sale price to the fair market value. Bundles, 856 F.2d at 824.

The Seventh Circuit did not reject outright the holding of Durrett:

> The [Fifth Circuit] court's reference to 70 percent has led other courts and commentators to read that opinion as establishing a fixed percentage mark--the so-called 'Durrett 70 percent rule'. However, the Fifth Circuit's actual approach in Durrett is one of simply analyzing the question of reasonably equivalent value in terms of whether the foreclosure sale price is some acceptable percentage of the fair market value of the property."

Bundles, 856 F.2d at 820.

The Seventh Circuit thus recognizes that the Fifth Circuit has not restricted this inquiry to only a pure 70% rule, but rather whether, in light of all the evidence, an acceptable portion of the fair market value was paid.

It is true that different circuits have taken divergent approaches when applying the term "reasonably equivalent value" to specific facts. Respondent

disagrees, however, that the various approaches resulting from different fact scenarios have led to noticeable discrepancies in the application of federal bankrupty law. The Seventh Circuit boasts few cases where a sale price below 70% of fair market value was deemed to be reasonably equivalent value. The issue is an ephemeral one, for the results under Durrett and Bundles appear similar, just reached by different means. One questions, too, how often forum shopping would ever occur because of slight discrepancies. The likelihood of setting aside a non-judicial foreclosure sale as a fraudulent conveyance does not depend upon the circuit in which the debtor lives, despite the implication of Petitioner. A review of cases demonstrates that Congress' failure to define the term "reasonably equivalent value" has not resulted empirically in

in grossly disparate results, as may be witnessed from Petitioner's failure to make any such showing.

Petitioner implies that had the Fifth Circuit Court of Appeals used the approach of the Seventh Circuit in applying "reasonably equivalent value" to the facts of this case, the court would have ruled that the standard had been met. However, even under the Seventh Circuit's approach, it is unclear how the transfer at issue could be said to have given Respondent the reasonably equivalent value of the property transferred.

Petitioner urges that Respondent received reasonably equivalent value because Respondent allegedly, as part of the sale, retained the right to recover all his equity in the property through a lease-purchase agreement with a subsequent purchaser. That is patently untrue. The

Bankruptcy Court did not find that Respondent received one dime as a result of the subsequent sale a month after the foreclosure sale by petitioner to Texas Bankers or any other event which has occurred subsequent to the foreclosure. There was also no evidence introduced of a valid enforceable agreement, nor a finding of fact as to any specific enforceable right which the debtor obtained as a result of consenting to this sale to Texas Bankers. Petitioner never discloses to this Court the fact that all of these purported "agreements" occurred after the foreclosure sale at issue, and furnished no part of the consideration for same. (Findings of Fact 6-12, Appendix 13a-18a).

All Judge Kelly found was that "Sherk had entered into some agreement with Texas Bankers that if it acquired the homestead property, he would enter into some form of

lease/purchase agreement in order to reacquire it." (Finding of Fact 11, Appendix 15a). That was, apparently, some oral agreement, as no written agreement granting such right was offered at trial, and the only document even referencing same was a letter from Texas Bankers written after the purported time for redemption had already expired.

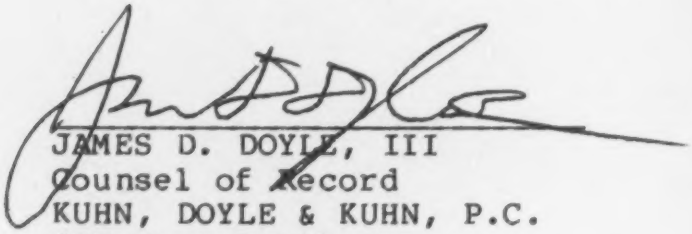
It is elementary that the Statute of Frauds would bar such an agreement's enforceability in the absence of written documentation; and given that fact, it does not appear from the state of the record that the debtor received anything as a result of the transfer, much less the "full value" for his equity, as contended by the Petitioner. Judge Kelly found, on the basis of the Petitioner's appraisal testimony, that the value of the property on the date of foreclosure was

$250,000.00, notwithstanding the Respondent's testimony that the property is worth approximately $324,000.00. (Finding of Fact 11, Appendix 16a). Most importantly, Judge Kelly specifically found that "no evidence was introduced by [Petitioner] CNB of any specific or enforceable agreement relating to such an understanding." (Finding of Fact 12, Appendix 17a). How the Petitioner can seriously contend that the Respondent received reasonably equivalent value for his equity of at least $126,000.00 by virtue of merely consenting to the later sale to Texas Bankers strains credulity.

CONCLUSION

For the reasons set forth above, Respondent respectfully prays that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,



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